Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

No. 98-885

In The

Supreme Court of the United States

October Term, 1998

NANCY G. PERÉ, individually and on behalf of her minor children, Matthew Reed Peré and Marci Danielle Peré,

Petitioner,

versus

NUOVO PIGNONE S.p.A., et al.,

Respondents.

On Petition For Writ Of Certiorari To Review Decision Of The Fifth Circuit Court Of Appeals

REPLY BRIEF ON BEHALF OF PERÉ WIDOW AND CHILDREN

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LIST OF ALL PARTIES

Nancy G. Peré, Matthew Reed Peré and Marci Danielle Peré	Plaintiffs/Petitioners
Tuthill Corporation and Coppus Engineering	Defendants in Principal Action Aligned with Plaintiffs on writ application
Nuovo Pignone, S.p.A.	Defendant/Respondent
General Electric Company	Defendants in Principal Action
Cabinda Gulf Oil Company, Division of the Chevron Company	Defendants in Principal Action

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REPLY ARGUMENT

The question of "tiering" – the question whether or not Nuovo Pignone qualifies as a "foreign sovereign" – has been a principal issue in this litigation. The district judge dealt with that issue as much as any other in her opinion. And she pointed out the split between the Ninth Circuit's decision in *Gates v. Victor Fine Foods,* 54 F.3d 1457 (9th Cir. 1995), and the decision by the Seventh Circuit in *In Re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994,* 96 F.3d 932 (7th Cir. 1996), which rejected the *Gates* analysis. Judge Doherty found other courts were following *In Re Air Crash Disaster,* although she found "The *Gates* court's statutory interpretation argument is strong and persuasive." Pet – B13. "However, the weight of authorities seems to be against this interpretation of the FSIA. District courts within the Fifth Circuit have found that entities indirectly owned by a foreign state are agencies or instrumentalities of foreign states." Id.

Judge Doherty's whole analysis of the "tiering" issue involves setting out the "split" in the circuits on this important matter.

Nuovo Pignone, in its opposition brief, asserts this Court cannot consider the "tiering" issue because it was not treated by the Fifth Circuit on appeal. Of course, the appeal to the Fifth Circuit was not taken by Nancy Peré; and when Nuovo Pignone appealed, it did not argue tiering, because Judge Doherty's ruling had been in its favor. The focus of the proceeding before the Fifth Circuit was on the "commercial activity" issue.

Normally, this Court does not consider issues raised for the first time on Certiorari and not dealt with by the lower courts. *Lurk v. U.S.*, 370 U.S. 530 (1962); *City of Houston Tex. v. Hill*, 482 U.S. 451 (1987). An argument "inadequately preserved" in lower court proceedings will not be considered by the Supreme Court. *Auer v. Robbins*, 519 U.S. 452 (1997). And the Supreme Court will not consider an issue which the Petitioner failed to raise in the Petition for Certiorari. U.S. Supreme Court Rules 14.1(a), 24.1(a); *Chadris, Inc. v. Latsis*, 515 U.S. 347 (1995).

But there is no hard-and-fast rule that this Court will never consider issues raised in the Petition for Certiorari, which were not disputed in the Court of Appeals. As to the question of "tiering" in our case, that issue was raised, briefed, and argued before the Trial Court. The Trial Court decided the matter and pointed out the clear split between circuits. Now, the "tiering" issue has been raised and briefed in Peré's Petition for Certiorari. All facts necessary for decision are in the record. The tiering issue is a major issue in this litigation, and raising it on certiorari does not present respondent with any unfair surprise.

This Court certainly has the power and right to consider issues that were not raised before the Court of Appeal. *Schiro v. Farley*, 510 U.S. 222, 114 Sup. Ct. 783, 127 L. Ed. 2d 47 (1994); *Ledron v. National R. R. Passenger Corp.*, 513 U.S. 374 (1995); *U.S. v. Williams*, 504 U.S. 36 (1992). This is especially true when the matter is important to the administration of federal law, and there is need to resolve uncertainties in the law. *Virginia Bank Shares, Inc. v. Sandberg*, 501 U.S. 1083 (1991).

The "tiering" issue presents a matter of central importance in administration of the FSIA, there is a split in the circuits causing uncertainty and a lack of uniformity which must be resolved. Additionally, resolution of that conflict is necessary to resolving the Peré's claim in a just and fair way. The issue was briefed in the trial court, evidence was presented; the trial judge addressed tiering in her decision; but Nuovo Pignone did not raise the issue on its appeal to the Fifth Circuit, and neither did Peré.

Nuovo Pignone argues that *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), is dispositive of the "tiering" issue. But the *Nelsen* case involved a plaintiff who was detained and tortured by the Saudi government, while an employee at a Saudi hospital. Essentially, this Court decided Plaintiff's injuries were caused by police misconduct which did not constitute "commercial activity". Furthermore, Nelson was unable to show anything that happened here in the United States relevant to the torture he suffered in Saudi Arabia. The Court said any connection between Nelson's recruitment here and his torture in Saudi Arabia was "far too tenuous to support jurisdiction".

In *Nelson*, this Court emphasizes that the Saudi government's tortious conduct did not comprise a "commercial activity", and that the FSIA does not give jurisdiction to our courts in matters involving a foreign state's "internal administrative acts". Id., U.S. p. 361.

The suit by Mrs. Peré and her children involves allegations of negligence and fault occurring in the United

States (where the faulty compressor starter was manufactured and purchased), and by U.S. companies working offshore from Angola (the starter engine was serviced by U.S. service companies), and resulting from a "reconfiguration" and reinstallation of the starter engine aboard the offshore platform (performed at Bayou Black, Louisiana). This suit definitely involves a "commercial activity" – Nuovo Pignone was doing precisely the same kind of business as its non-government competitors, and for profit. And most of the negligent acts alleged occurred either in the United States or aboard the offshore platform, not in Italy.

Additionally, the Peré causes of action arise out of work and relationships (purchase, handling, servicing, reconfiguration, and installation of a piece of equipment) governed by "contracts" entered into between Nuovo Pignone and U.S. corporations. This is a *tort* action arising out of activities governed by *contracts.* And the explosion and death of Mr. Peré occurred because of faulty performance by parties (breach of duties owed) under those *contracts.*

In a concurring opinion in *Nelson,* Justice White considers an argument not raised in the trial and appellate courts, and points out that "The purpose of the commercial exception [is] to prevent foreign states from taking refuge behind their sovereignty when they act as market participants. . . . " Id., U.S., p. 368.

In their dissents, Justices Kennedy, Blackmun, and Stevens say they believed the lawsuit should not have been dismissed, and that there was FSIA jurisdiction. They also note that the question of right of recovery for

tort depends on state law and is of no concern to the federal court when considering FSIA jurisdiction:

> As a matter of substantive tort law, it is not a novel proposition or a play on words to describe with precision the conduct upon which various causes of action are based and to recognize that a single injury can arise from multiple causes, each of which constitutes an actionable wrong. See, Restatement (Second) of Torts, §§ 447-449 (1965). *Nelson, id., U.S., p. 375.*

Justice Stevens, in his dissenting opinion, believed Saudi Arabia *was* engaged in commercial activities that had "sufficient contact with the United States to justify the exercise of federal jurisdiction". Id., U.S., p. 377. He pointed out that the Saudi government maintained an office in Maryland, purchased hospital supplies and equipment in this country, that the hospital's American agent maintained an office in the United States. . . . We have already shown that Nuovo Pignone has far more contacts than these in the United States; and the Peré suit alleges a defective starter engine that exploded because of negligence in its manufacture, repair, servicing, "reconfiguration", and reinstallation aboard the platform. Some of these negligent actions occurred here in the United States, others elsewhere.

Justice Stevens points out that there are widely divergent possible interpretations of § 1605(a)(2): On the one hand, the provision can be read to give a broad "general" jurisdiction over foreign entities that engage in substantial commercial activities in this country; and, on the other hand, it can be read to grant only a narrow "specific" jurisdiction over particular commercial claims that

have a substantial contact with the United States. He believed this Court should have accepted jurisdiction on Nelson's tort action:

> If the same activities had been performed by a private business, I have no doubt jurisdiction would be upheld. And that, of course, should be a touchstone for our inquiry; . . . When a foreign nation sheds its uniquely sovereign status and seeks out the benefits of the private marketplace, it must, like any private party, bear the burdens and responsibilities imposed by the marketplace. *Id., U.S., p. 379.*

Peré was killed by a defective starter engine. A good number of contracts affected that starter engine, and Peré's claim involves duties of the defendants in their contractual capacities as "manufacturer", "designer", "reconfigurer", "installer", and service companies charged with "maintenance and repair" of the compressor engine with its starter. A whole contractual régime surrounded operation of the compressor engine aboard the platform off the coast of Angola. And that contractual régime involved contracts entered into in the United States between Nuovo Pignone and a number of U.S. companies.

Peré has shown the Court that in one of the more recent contracts, Nuovo Pignone has waived its sovereign immunity rights and agreed to arbitration and decision of disputes on the basis of the law of Texas. Peré believes that the waiver in that contract and agreement establishes Nuovo Pignone's concession to be treated as a private business player, and not a sovereign entity, in its relations with other parties to the contractual régime. Peré worked

and was killed in the context of the régime set up by those contracts. We do not believe it necessary to establish that our suit is a suit on the very contract in which the waiver occurred, as Nuovo Pignone argues in its opposition brief.

The Court needs to clarify and specify principles governing the reach of contractual waivers. The cases cited by Nuovo Pignone in its opposition brief do not fit the case at bar. Lower courts have tried a number of approaches, but a uniform understanding and outcome is needed – one that recognizes the need to assure a fair handling of tort claims by American citizens killed and maimed far from home.

Respectfully submitted,

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